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Supreme Court, U.S.
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No. 99-107

In The

Supreme Court of the United States

TERRY LUNDELL,

Petitioner,

vs.

DANIEL WATKINS and CYNTHIA WATKINS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY TO BRIEF IN OPPOSITION

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13pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 2

A. The Soldiers' And Sailors' Civil Relief Act Of 1940 Applies Directly To The Petitioner 2

B. The Petitioner Did Timely Apply To The District Court To Obtain Relief From The Default Judgment Pursuant To The Soldier's And Sailor's Relief Act Of 1940 5

C. Even Should It Be Found That The Petitioner Did Not Timely Apply To The District Court To Obtain Relief From The Default Judgment Pursuant To The Soldiers' And Sailors' Relief Act Of 1940, This Does Not Preclude Voiding Of That Judgment 6

D. The Lundells Were Prejudiced By Reason Of Mr. Lundells' Military Service In Making His Defense Thereto 7

E. The Lundells Had A Meritorious Defense 8

F. The Petitioner Has Identified A Conflict Among Lower Courts And An Important Federal Question Reguiring This Court's Reveiw, And The Arguments Offered In Support Do Raise A Justiciable Issue And Apprise The Court And The Respondent Of The Specific Claims Advanced By The Petitioner 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Akers v. Bonifasi, 629 F. Supp. 1212 (M.D. Tenn. 1984) 5

Albert Levine Associates, Inc. v. Denny Kershner, 45 F.R.D. 450 No. 68 Civ. 113 (1968) 7

Davidson v. General Finance Corp., 295 F. Supp. 878 (Dist. Ga. 1968) 3

Hadges v. Yonkers Racing Corp., 48 F.3d 1320 (2nd Cir. 1995) 3

Kirby v. Holman, 25 N.W.2d 664, 238 Iowa 335 (Iowa 1947) 5

Krumme v. Krumme, 6 Kan. App.2d 939, 636 P.2d 814 (1991) 3

Oliver v. Oliver, 12 So.2d 852, 244 Ala 234 (1943) 4

Ostrowski v. Pethick, 404 Pa. Super. 392, 590 A.2d 1290 (1991) 3

U.S. v. Kaufman, 453 F.2d 306 (2d Cir. 1971) 5

STATUTES

50 U.S.C. § 511(1) 3

50 U.S.C. § 520(1) 3, 5

50 U.S.C. § 520(4) 5, 6

RULES

Fed. Rule Civ. P. 55(b)(1) 3, 9

Fed. Rule Civ. P. 55(b)(2) 3, 9

TABLE OF AUTHORITIES – Continued

Page

Fed. Rule Civ. P. 55(c) 6, 7

Fed. Rule Civ. P. 60(b) 1, 6, 7

STATEMENT OF THE CASE

Petitioner requests review of the Eighth Circuit's opinion affirming in part and reversing in part a decision denying relief from a default judgment under Federal Rule of Civil Procedure 60(b)(6). The underlying district court decision appealed to the Eighth Circuit awarded actual damages in the amount of $235,000.00 against Petitioner, Terry Lundell, and his wife, Stephanie Lundell. The district court awarded punitive damages in the amount of $3,500,000.00 against the Petitioner, Terry Lundell, and $117,500.00 against his wife Stephanie Lundell. At the time of the entry of the default judgment, November 18, 1993, Petitioner Terry Lundell was in active military duty and continued with such duty until January 2, 1998. The Default Judgment was redocketed as a Motion for Judgment on November 23, 1993 (Clerk's Pleading Index Entry #4).

On December 2, 1993, U.S. District Judge Ronald E. Longstaff referred the case to U.S. Magistrate Mark W. Bennett for recommendations. (Clerk's Pleading Index Entry #5). On December 15, 1993, Magistrate Bennett entered an order directing that an evidentiary hearing be held on Appellees' Motion for Judgment on January 7, 1994 at 9:00 AM. (Evidentiary Hearing) (App. at 141). Said order was stamped "Copy to Counsel" and initialed by the Court. Id. Said order does not indicate that a copy was served or mailed to Appellants. Id. Appellants were without counsel at the time the order for the Evidentiary Hearing was entered and were without knowledge of the hearing. On January 7, 1994 the Evidentiary Hearing was held in U.S. District Court. Appellants did not appear and were not represented at the hearing by counsel.

On July 6, 1995, Appellants filed a Motion to Set Aside Default Judgment, for Bill of Review in Equity and for Relief under the Soldiers' and Sailors' Relief Act (combined motion) (App. at 54-69). On April 21, 1997,

U.S. Magistrate Ross Walters filed a report and recommendation to Judge Longstaff concerning the combined motion (Second Report). (App. at 181-206). The result of this report was that the Court affirmed the award of actual damages against the Petitioner and his wife but reversed the award of punitive damages by reducing the amount against the Petitioner from $3,500,000.00 to $940,000.00 and eliminating the punitive damages against the Petitioner's wife. Following this order, Petitioners filed a Motion to Amend Findings of Fact and Judgment and Brief in support thereof. On August 21, 1997, Appellees resisted the Petitioners Motion although the Petitioners were never served with notice of said resistance. On August 29, 1997, Judge Longstaff over-ruled the Petitioners Motion to Amend Findings of Fact and Judgment. Thereafter, Petitioners filed said Notice of Appeal before this Court.

REASONS FOR GRANTING THE WRIT

THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT OF 1940 APPLIES DIRECTLY TO THE PETITIONER

It has been established that between the date of service of the Summons and Complaint on August 28, and the entry of default on November 23, the Petitioner was engaged in military activity. See Exhibits 3, 12. Between November 23 and the entry of Judgment on February 16, 1994 the Petitioner was also involved in military activity. The Petitioners military activity officially ended on January 2, 1998. The United States District Court for the Southern District of Iowa Central Division found that "while for most of the entries of his duty status is unclear . . . (*See* Exhibit 3.) . . . giving Mr. Lundell the benefit of the doubt, the most the record indicates is that periodically during the relevant time period he was on active duty with his unit the longest period of which was

ten days". While this may be true, it is important to remember that there were many "periods" of duty during the relevant time periods.

The Soldiers' and Sailors' Relief Act of 1940 provides in part:

> 1) In any action or proceeding commenced in any court, if there shall be a default or any appearance by the defendant, the plaintiff, before entering judgment shall file in the court an affidavit setting forth facts showing that the defendant is not in military service. 50 U.S.C. App. 520(1).

If the defendant is ***in military service*** (emphasis added), no default judgment is to be entered except upon court order following appointment of an attorney to represent the defendant, and the court may require a bond to indemnify the defendant from loss should the judgment later be set aside. Id. The term "military service" is defined as "Federal service on active duty with any branch" of the Armed Forces. 50 U.S.C. App. 511(1). The District Court found that Terry Lundell was in "military service" at the time of the entering of the default judgment. (Pet. App. 33.)

While the affidavit of Mr. DuPuy in support of the motion for entry of default judgment averred that the defendants were not "infants or incompetent persons, nor were they under any other legal disability within the meaning of Fed. R. Civ. P. 55(b)(1) or (2)," the affidavit did not allege, or set forth facts showing that the defendants were not in military service (or that Mr. Lundell was), and accordingly was insufficient. While a violation of the statute renders a judgment voidable and not void, *see Davidson v. General Finance Corp.*, 295 F. Supp. 878, 881 (Dist. Ga. 1968), *Ostrowski v. Pethick*, 404 Pa. Super. 392, 590 A.2d 1290, 1294 (1991), *Krumme v. Krumme*, 6 Kan. App.2d 939, 636 P.2d 814, 817 (1991), Plaintiff asserts that this affidavit amounts to a fraud on the Court. *See Hadges*

v. Yonkers Racing Corp., 48 F.3d 1320, 1325 (2nd Cir. 1995). Mr. DuPuy testified that he had researched the issue and "concluded" that the Soldiers' and Sailors' Relief Act applied to full time or active members of the military and that Lundell was not under a disability by reason of that act since he "concluded" that Lundell was only a "part-time" Air Force pilot. The Court found that this "explanation" coupled with the ambiguities concerning Lundell's duty status was against any finding of fraud. This finding flies in the face of justice. If DuPuy "researched" the issue and "concluded" that Lundell was not in military service at the time of the filing of the default judgment, being fully aware of the requirements of the affidavit since he "researched" it, the affidavit should have properly set forth the facts that the defendants were not in military service. On the contrary and clearly fraudulently, the required reference to military service was completely omitted. There can be no explanation for this omission other than a perpetration of fraud on the court. The Court, while finding that Lundell was involved in military service during the period of time between the serving of the summons and complaint and the entering of the default judgment, while at the same time was apprised of the fact that DuPuy had "researched" the issue and unilaterally "concluded" that Lundell was only part-time and therefore, not in military service as defined by the act erred by not voiding the judgment.

The insufficiency of the affidavit was purposely deceiving and of enormous gravity and thus the entry of the Default Judgment was fatally flawed at its inception and the failure of the Court to void the Default Judgment was clearly erroneous and constituted reversible error.

Section 501 et seq. of this Appendix was intended solely for the benefit of those in the armed services of the United States, and is to be liberally construed to effectuate its purpose. *Oliver v. Oliver*, 12 So.2d 852, 244 Ala. 234

(1943). One of the purposes of this section is to prevent default judgments from being entered against members of the armed services in circumstances where they might be unable to appear and defend themselves. *U.S. v. Kaufman,* 453 F.2d 306 (2d Cir. 1971). The (Act) is also designed to be construed liberally to prevent injury to their civil rights during their term of service arising from judicial proceedings. *See Kirby v. Holman,* 25 N.W.2d 664, 238 Iowa 335 (Iowa 1947). The requirements of the affidavit provision of the Soldiers' and Sailors' Relief Act of 1940 (50 U.S.C.A. App. § 520(1)) are *mandatory* (emphasis added), and restrict the court's power to render a default judgment until they have been met. *Akers v. Bonifasi,* 629 F. Supp. 1212 (M.D. Tenn. 1984).

PETITIONER DID TIMELY APPLY TO THE DISTRICT COURT TO OBTAIN RELIEF FROM THE DEFAULT JUDGMENT PURSUANT TO THE SOLDIERS' AND SAILORS' RELIEF ACT OF 1940.

50 U.S.C. § 520(4) provides, in pertinent part:

> If any judgment shall be rendered in any action or proceeding governed by this section against any person in military service during the period of such service or within thirty days thereafter, and it appears that such person was prejudiced by reason of his military service in making his defense thereto, such judgment may, upon application, made by such person or his legal representative, not later than ninety days after the termination of such service, be opened by the court rendering the same and such defendant or his legal representative be let in to defend; provided it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof.

The Petitioner filed his Motion to Set Aside Default Judgment, for Bill or Review in Equity and for Relief

under the Soldiers' and Sailors' Relief Act (combined Motion) (App. at 54-69) on July 6, 1995. His last official day of service was January 2, 1998. The filing of his petition was well before the time limits set forth in 50 U.S.C. § 520(4). While his active duty was not continuous, there was never a period of 90 days during which he was not in active duty. Appellees side stepped this issue by admitting that although Lundell was involved in military duty up until January 2, 1998, he was to have been considered in the United States for a period of 90 days. The fact is that Lundell was flying outside the United States on numerous occasions.

Appellees contended that since Lundell never "landed" in those foreign countries, he was considered to be in the United States which contention is ludicrous. Certainly justice does not demand that Lundell prepare and defend himself while flying refueling missions, risking his life for his country, but the Court unbelievably and unjustly concurred that since Lundell did not physically "land" the aircraft he was flying in those foreign countries, he was not "in" those foreign countries during the time periods in question.

EVEN SHOULD IT BE DETERMINED THAT THE PETITIONER UNTIMELY FILED HIS MOTION TO THE DISTRICT COURT TO OBTAIN RELIEF FROM THE DEFAULT JUDGMENT PURSUANT TO THE SOLDIERS' AND SAILORS' RELIEF ACT OF 1940, THIS UNTIMELINESS DOES NOT NECESSARILY PRECLUDE VOIDING OF THAT JUDGMENT.

While since the Default Judgment was fatally flawed at its inception, the untimeliness of the filing of the Application to Obtain Relief from the Default Judgment Pursuant to the Soldiers' and Sailors' Relief Act of 1940 should have been moot, Motion for entry of a default judgment is addressed to sound discretion of trial court. Fed. Rules Civ. Proc. rules 55(c), 60(b), 28 U.S.C.A., *See*

Albert Levine Associates, Inc. v. Denny Kershner, 45 F.R.D. 450 No. 68 Civ. 113 (1968). Under Rule 55(c), if an defendant's answer is filed late, the Court for good cause shown may set aside an entry of default and, if a judgment by default had been entered, may likewise set it aside in accordance with Rule 60(b). As a result of the actions of the Courts, his service in the military, the insufficient affidavit, the non-notice of the evidentiary hearing, the Lundells were unable to file an answer and can show good cause for the untimeliness of their application to the Court to obtain relief from the Default Judgment pursuant to the Soldiers' and Sailors' Relief Act, one good cause being the continued military service of Mr. Lundell, which service was sensitive and of a higher level of military clearance.

THE LUNDELLS WERE PREJUDICED BY REASON OF MR. LUNDELLS' MILITARY SERVICE IN MAKING HIS DEFENSE THERETO.

The fact that Mr. Lundell was in active military service during the time period between the service of the Summons and Complaint and the entry of the Default Judgment precluded Mr. Lundell from defending himself and his spouse. It has been established by the removal of the punitive damages against Stephanie Lundell that she had no knowledge of the proceedings or circumstances surrounding the action. She would have been unable to consult with counsel since she was unknowledgeable regarding the circumstances. Her only involvement was signing at the request of her husband a settlement agreement. As a result of Lundell being unable to defend, the judgment was entered and as a direct result of unilateral and unproved testimony of the Plaintiffs, exorbitant punitive damages were awarded against Lundell without him ever being able to offer a defense or true and accurate statements of his worth.

As a result of unsubstantiated statements by the Plaintiff advising the Court that the Lundells were worth "millions of dollars", and unsubstantiated statements by the Plaintiffs describing the actions of Mr. Lundell which were presented by the Defendants as heinous without Mr. Lundell having the opportunity to defend himself or rebut those statements, the excessive punitive damages were awarded.

Plaintiffs have made much of the fact that Mr. Lundell was able to make contact with an attorney and carry on some of his personal business and was aware of the pendancy of the Complaint and the Default Judgment. However, the fact that Mr. Lundell was able to manage some necessities vital to the support of his family and was able to find some time to attempt a defense does not mean that his military service which was vital to our country, numerous and by necessity largely unscheduled due to its sensitive nature allowed him to devote even the remotest amount of time necessary to properly defend himself against such a complicated complaint. Additionally, the security nature of his activities which resulted in his duty status to be related to the Court as "unclear" prejudiced Lundell in that this "unclearness" was interpreted by the Court that Mr. Lundell's military service was of minor nature with only occasional duty.

THE LUNDELLS HAD A MERITORIOUS DEFENSE

While never allowed to present it, the Defendants did have a meritorious defense to the charges which in order to preserve justice should have been allowed to be presented at trial. The Lundells were never afforded the opportunity to defend themselves because Mr. Lundell was serving his country.

THE PETITIONER HAS IDENTIFIED A CONFLICT AMONG LOWER COURTS, REVERSIBLE ERROR AND AN IMPORTANT FEDERAL QUESTION REQUIRING THIS COURT'S REVIEW, AND THE ARGUMENTS OFFERED IN SUPPORT DO RAISE A JUSTICIABLE ISSUE AND APPRISE THE COURT AND THE RESPONDENT OF THE SPECIFIC CLAIMS ADVANCED BY THE PETITIONER.

The Petitioner has clearly set forth the question for review, admittedly there are more than one. However, the most important one which has been identified is that the original Application for Default Judgment was fatally flawed in that the statement regarding military service was purposefully omitted. The Court improperly decided that this omission did not constitute fraud upon the Court.

The Lundells were improperly not noticed of the Evidentiary Hearing and were therefore not in attendance, had no counsel to represent them and were grievously prejudiced by the judgment and the punitive damages awarded against them.

The Soldiers' and Sailors' Relief Act was enacted to protect those in service of their country from default judgments being entered against them while they were unable to defend themselves while in the service of their country. Justice is not served when a Plaintiff is allowed to "research" whether or not the Defendant is covered by the act and if they conclude he is not, completely omit any reference to that service in their affidavit.

DuPuy admitted that he "referenced" the matter and therefore was clearly aware of the requirement, and it is unjust to allow the omission. On this premise, all affidavits may be omitted if a Plaintiff "researches" the matter and "concludes" that the Defendant is not an infant or incompetent person or under any other legal disability within the meaning of Fed. R. Civ. P. 55(b)(1) or 2, or "is" or "is not" actively involved in the military. Allowing the

decision of the United States District Court For The Southern District of Iowa, Central Division to stand that the "omission of the affidavit which did not allege, or set forth facts showing that the Defendants were not in military service (or that they were), did not void the Default Judgment" sets a dangerous precedent. According to that decision, any Plaintiff can at will omit the portion of the affidavit that refers to military service and the men and women serving our country will then be forced to incur legal expenses, time, effort and frustration to prove to the Court that they were in fact in military service, a luxury few of those in the service of our country can afford. Allowing that decision to stand reduces the Soldiers' and Sailors' Relief Act to a meaningless farce. Therefore, this Motion presents a question of grave importance to all of the men and women in the active service of their country and denial of its hearing would be a grave injustice.

CONCLUSION

For the reasons set forth in this Brief and the Writ of Certiorari filed on July 15, 1999, this Court should grant the Petition for Writ of Certiorari as requested.

Respectfully submitted,

TERRY LUNDELL

DATE: September 23, 1999